SRI ALAM SDN. BHD.

v.

NEWACRES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' N.H. CHAN JCA
[ORIGINATING SUMMONS NO. C189 OF 1985]
20 SEPTEMBER 1995

EQUITY: *Fiduciary duties - Whether defendant in fiduciary relationship with plaintiff - Whether there was breach of fiduciary duties - Whether making of a profit proved.*

CONTRACT: *Joint venture agreement - Whether a partnership had been created between parties - Attributes of a partnership - Whether "business in common" carried out - Sections 3(1), 31 & 32 Partnership Act 1961.*

PRACTICE & PROCEDURE: *Whether cause of action had accrued - Whether cause of action pleaded - Defence of set-off - O. 18 r. 17 Rules of the High Court 1980.*

The plaintiff had appealed to the Supreme Court against a judgment of the High Court dismissing its claim against the defendant. The Supreme Court allowed the appeal and ordered that the case be remitted to the High Court for trial before another Judge to determine the extent or scope of the fiduciary duties owed by the defendant and any breach of them by the defendant and to assess the sums (if any) which may be found due to the plaintiff.

The plaintiff and defendant had entered into a "joint venture agreement" but the term "joint venture" was not found anywhere in the text of the agreement. The agreement provided that the plaintiff who was the registered proprietor of the land mentioned in the agreement, had offered to the defendant to develop the said land into a housing development, which offer had been accepted by the defendant. The relevant terms were:

(a) clause 1 provided that the defendant was to pay an advance of RM7,500,000 to the plaintiff for the development and the plaintiff was to be alloted plots as set out in clauses 5 and 22 with the defendant retaining the balance of the plots to be sub-divided from the land.

(b) clause 15 provided that the defendant may require the land to be transferred to it whereupon the land shall be deemed to have been sold to the defendant subject to the plaintiff's entitlement in clause 5 and such properties to be held on trust by the defendant for the plaintiff.

The dispute between the parties was in relation to the non-delivery of 56 units of semi-detached homes (clause 5(a)), 7 bungalow plots (clause 5(b)), the cinema unit (clause 5(d)(i)), extra shoplots and residential plots from the layout plan approved after survey (clause 5(a)(ii)) and all portions required for public use or purpose (clause 5(d)(iii)).

The issues for determination by the Court were the following:

(i) the nature of the relationship between the plaintiff and the defendant i.e whether it was akin to a partnership;

(ii) whether that relationship imposed on the defendant, in relation to the particular transaction, duties of a fiduciary character;

(iii) whether the cause of action had accrued and had been pleaded;

(iv) whether profits had been made by the defendant by reason of its position and whether there was a consequent breach of fiduciary duties, if any; and

(v) whether the defendant could plead set-off to retain the advance made by the plaintiff.

Held:

[1] In a partnership, a partner is a fiduciary towards his co-partners in all partnership dealings and transactions. The agreement between the parties, even though described as a joint venture agreement, does not exhibit the normal attributes of a partnership. Many of the rights and duties normally associated with partnership such as an obligation to contribute capital and to share losses and profits and a right to participate fully in the management of the firm are not exhibited in the contract. There is no "business in common" between the plaintiff and defendant. Each is carrying on a wholly separate business. Therefore there is no partnership and the defendant is not a fiduciary as a partner.

[2] Under clause 5(a) the defendant held the properties on trust for the plaintiff and as a trustee, the defendant is in a fiduciary position to the plaintiff in respect of the plaintiff's entitlement under the said clause.

[3] For late or non delivery of the 56 units of semi-detached houses, the plaintiff's remedy lies in contract (for damages or specific performance) but the cause of action was not pleaded. Further the cause of action had not accrued in 1985 when the proceeding was filed. There was also no evidence to show that the defendant had profited from the trust. Therefore, the defendant did not breach its duty as a fiduciary.

[4] For the other provisions of clause 5, the defendant occupies a fiduciary position even though it is not a trustee holding property in trust. In relation to the 7 bungalow plots (clause 5(b)), the plaintiff's remedy lies in contract but the cause of action had not accrued in 1985 nor was it pleaded.

[5] In relation to clauses 5(d)(i) and 5(d)(iii), the cause of action has not been pleaded by the plaintiff. If as a matter of construction, the plaintiff was entitled to have the survey done by the defendant under clause 5(d)(ii) the plaintiff should have sued to compel the defendant. Since the survey was not done clause 5(d)(ii) has become superflous.

[6] There is no evidence that the defendant made a profit by means of its position or by the property held for the plaintiff. The defendant has not breached its fiduciary duty.

[7] Order 18 r. 17 RHC 1980 allows a defendant to plead a set-off in answer to a claim. As the plaintiff had not made a claim for the money collected on its behalf by the defendant from the purchasers, this defence is not available to the defendant in this case.

[Plaintiff's claim dismissed].

Cases referred to:

re Coomber, Coomber v. Coomber [1911] 1 Ch. 723 ***(refd)***
New Zealand Netherlands Society v. Kuys [1973] 2 All ER 1222 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
English v. Dedham Vale Properties Ltd. [1978] 1 ALLER 382 ***(refd)***
Laskin v. Bache & Co. [1971] 23 DLR ***(refd)***
Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd. [1995] 1 MLJ 513 ***(foll)***
Parker v. McKenna [1874] LR 10 Ch. 96 ***(refd)***
Bray v. Ford [1896] AC 44 ***(refd)***

Regal (Hastings) Ltd. v. Gulliver [1942] 1 All ER 378 ***(refd)***
Boardman v. Phipps [1967] 2 AC 46 ***(refd)***
G.H. Jones [968] 84 LQR 472 ***(refd)***
Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd. [1991] 3 MLJ ***(refd)***

Legislation referred to:
Partnership Act 1961, ss. 3, 4, 31, 32, 34
Partnership Act 1890 (UK), ss. 1, 2
Rules of the High Court 1980, O. 18 r. 17

Other sources referred to:
Fiduciary Relationships, LS Sealy, (1962) CLJ 69 p. 73
Snell's Equity, 29th edn. (1990) pp. 245, 253
Lindley & Banks on Partnership, 16th Edn. (1990), pp. 59, 60, 61, 412, 413, para. s. 5-01, 5-03 16-08

For the plaintiffs - G. Sri Ram (up to 15 September 1994, after which date Counsel was elevated to the Court of Appeal), V. Manokaran (Joseph Yeo & V. Nadarajan with him); M/s. Sri Ram & Co.
For the defendant - Mohd Ismail (Jin Chong & Oommen Koshy with him); M/s. Mohamed Ismail & Co.

JUDGMENT

N.H. Chan JCA:

This case was commenced by originating summons but subsequently it was continued by order of the Court as a writ action with pleadings to be filed.

On 7 December 1993, the Supreme Court had allowed (in Supreme Court Civil Appeal No. 02-368-1992) an appeal by Sri Alam Sdn. Bhd. against the judgment of the High Court dismissing its claim against Newacres Sdn. Bhd. The case was also ordered to be remitted for trial before another Judge of the High Court to determine the extent of the fiduciary duties in the case and any breach thereof, and to assess what sum of money or other entitlement, if any, which the appellant is entitled to receive from the respondent.

By a letter dated 21 December 1993, Gunn Chit Tuan CJ (Malaya) has appointed me to try this case on a priority basis. In that letter, the former Chief Justice also enclosed the decision made by the Supreme Court which I reproduce below:

Supreme Court Civil Appeal No. 02-368 OF 1992
(Mahkamah Tinggi Saman Pemula No. C189/1985)

Sri Alam Sdn. Bhd. ... Perayu

Newacres Sdn. Bhd. ... Penentang

Coram: Gunn Chit Tuan, CJ (Malaya)
Mohd. Azmi, SCJ
Mohamad Dzaiddin, SCJ

Unanimous Orders

1. Appeal of appellant is allowed.
2. Order of the trial Judge in dismissing plaintiff's claim is reversed and set aside. Judgment is hereby entered for the appellant on liability.
3. Case is remitted for trial before another High Court Judge to determine the extent of the fiduciary duties in this case and any breach thereof, and to assess what sum of money or other entitlement, if any, which the appellant is entitled to receive, from the respondent, and to make all consequential orders.

4. Appeal against counter claim is also allowed and the High Court is to determine any set off.

5. Half costs to appellant here and below.

It is not easy to understand the order of the Supreme Court. In one breath, by order (2), it says, "Judgment is hereby entered for the appellant on liability" which in effect is granting the declaration sought by the plaintiff. The plaintiff had claimed for "a declaration that the defendant has acted in breach of its fiduciary duties." In the next breath, by order (3), the Supreme Court orders the case to be sent back to the High Court for trial "to determine the extent of the fiduciary duties in this case and any breach thereof."

If judgment had been given for the plaintiff against the defendant for breach of fiduciary duty, then, there would be no need to remit the case to the High Court to determine if there was a breach of fiduciary duty by the defendant. There could not be a judgment on liability in a fiduciary relationship case unless there had been a breach of fiduciary duty. If the breach had already been determined by the judgment on liability as stated in order (2), then, it would be superfluous to ask the High Court, as stated in order (3), to determine "any breach thereof" of the fiduciary duties, the extent or scope of which, in any case, has yet to be determined by the Court.

I think the words in order (2) that "judgment is hereby entered for the appellant on liability" are unnecessary, otherwise, order (3) will have no meaning.

They should be disregarded as they made order (2) inconsistent with order (3).

There is another way of looking at order (2). It could mean "judgment is hereby entered for the appellant on liability" **as a fiduciary**, so that when we come to order (3), we can "determine the extent of the fiduciary duties in this case and any breach thereof." But that seems like a *non sequitur* because it means that the Supreme Court, despite after having found that there was liability against the defendant (which could only be so if there had been a breach of a fiduciary duty), is still asking the High Court to determine if there was a breach of a fiduciary duty all over again.

As demonstrated above, it is only where order (2) is otiose that order (3) can be proceeded with. If order (2) was to prevail over order (3), then order (3) would be superfluous because it would no longer serve any useful purpose for the High Court to determine if there was a breach of fiduciary duty.

The upshot of all this is that only order (3) prevails when the case is remitted for trial before another Judge of the High Court who is to determine the extent or scope of the fiduciary duties owed by the defendant in this case and any breach of them by the defendant, and to assess the sums (if any) which may be found due to the plaintiff. Thus it has fallen on me as the Judge who has been appointed by the then Chief Justice to determine these issues, and the scope of my enquiry is only confined to the terms of order (3) plus the consideration whether set-off as a defence is available to the defendant as stated in order (4).

Fletcher Moulton LJ in *re Coomber, Coomber v. Coomber* [1911] 1 Ch. 723 said, at 728, 729:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has

> been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.

Dr. Sealy in his article (L.S. Sealy "*Fiduciary Relationships*" (1962) CLJ 69) says this, at p. 73:

> The word "fiduciary," we find, is not definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied.

It is not every kind of fiduciary relationship that justifies every kind of interference. The nature of the fiduciary relationship must be such that it justifies the interference. We must be able to recognise that a fiduciary relationship situation exists. There should not be any difficulty to be able to do so when we meet one. The extent or scope of a fiduciary's duty will depend on the nature of the fiduciary relationship. The justification for the interference will then depend on the nature of the fiduciary relationship.

In *New Zealand Netherlands Society v. Kuys* [1973] 2 All ER 1222, Lord Wilberforce, giving the judgment of the Privy Council (Lord Wilberforce, Lord Hodson, Lord Pearson, Lord Diplock and Lord Simon of Glaisdale) said, at 1225:

> Their Lordships are in agreement with these contentions insofar as they stress the necessity to give consideration to the nature of the relationship between Kuys and the society and to the question whether that relationship imposed on him, in relation to the particular transaction under investigation, duties of a fiduciary character. The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords (*Boardman v. Phipps* [1966] 3 All ER 721, [1967] 2 AC 46). It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Boardman v. Phipps* [1966] 3 All ER at 756, [1967] 2 AC at 123:
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> > Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.

The principle or rule, i.e. the obligation of a fiduciary not to profit from his position, was enunciated in 1726 in the case of *Keech v. Sandford* [1726] Sel. Cas. Ch. 61 and was originally restricted to trustees. The rule has been applied since to agents, as, for example, solicitors and directors of limited companies, to partners and to master and servant relationships, but the precise scope of it must be moulded according to the nature of the relationship. For examples of other persons to whom the principle applies, see *Snell's Equity*, 29th Edn. (1990), at p. 253:

> Similar restrictions on the making of profits have been imposed on servants (*Reading v. Att.-Gen.* [1951] AC 507), guardians (*Hatch v. Hatch* [1804] 9 Ves. 292), partners (*Aas v. Benham* [1891] 2 Ch. 244; *Thompson's Trustee In Bankruptcy v. Heaton* [1974] 1 WLR

605; *Chan (Kak Loui) v. Zacharia* [1984] 154 CLR 178), promoters of companies (*Erlanger v. New Sombrero Phosphate Co.* [1878] 3 App. Cas. 1218; *Gluckstein v. Barnes* [1900] AC 240; *Jubilee Cotton Mills Ltd. v. Lewis* [1924] AC 958), managing owners of ships *(Williamson v. Hine* [1891] 1 Ch. 390), receivers (*Nugent v. Nugent* [1908] 1 Ch. 546), managers of young artists (O' *Sullivan v. Management Agency and Music Ltd.* [1985] QB 428), borough treasurers (*Att.-Gen. v. De Winton* [1906] 2 Ch. 106), and members of a committee of inspection in bankruptcy *(Re Bulmer* [1937] Ch. 499). Indeed, there is authority for saying that in this context there is a fiduciary relationship "whenever the plaintiff entrusts to the defendant a job to be performed" *(Reading v. R.* [1949] 2 K.B. 232 at 236, *per* Asquith L.J.; affirmed [1951] AC 507), so that a servant of the Crown who accepts bribes for misusing his position is accountable to the Crown for the bribes (*Reading v. Att.-Gen.* [1951] AC 507). Similarly, a prospective purchaser who, unbeknown to the prospective vendor, applies for planning permission in the latter's name is accountable for the profits accruing from the permission. He is a self-appointed agent whose acts can be ratified and adopted (*English v. Dedham Vale Properties Ltd.* [1978] 1 WLR 93).

Just as "the categories of negligence are never closed" (*Donoghue v. Stevenson* [1932] AC 562), similarly, Arnup J said in *Laskin v. Bache & Co.* [1971] 23 DLR (3d) 385, 392:

> In my opinion the category of cases in which fiduciary obligations and duties arise from the circumstances of the case and the relationship of the parties is no more closed than the categories of negligence at common law.

See *English v. Dedham Vale Properties Ltd.* [1978] 1 All ER 382, 398, where Slade J said:

> I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed. They are, after all, no more than formulae for equitable relief.

See also *Chooi Siew Cheong v. Lucky Height Development Sdn. Bhd.* [1995] 1 MLJ 513, at 522 where Chong Siew Fai FCJ (as he was then), giving the judgment of the Federal Court (Eusoff Chin CJ, Mohamed Azmi and Chong Siew Fai FCJJ) said this:

> the classes of cases in which a fiduciary duty has been held to exist are not closed.

The strength, and indeed the severity, of the rule that no fiduciary may profit from his position as a fiduciary is said to be an "inflexible" rule of equity. This often quoted phrase is from the judgment of James LJ. In *Parker v. McKenna* [1874] LR 10 Ch. 96, at 124, 125 (where the Judge after laying down the principle that "no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal" said that):

> that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

This was repeated by Lord Herschell in *Bray v. Ford* [1896] AC 44, at 51, 52:

> It is an inflexible rule of a Court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is

danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore been deemed expedient to lay down this positive rule.

This inflexible rule of equity depends not on fraud or absence of *bona fides,* but on the mere fact of a profit made. See *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All ER 378. Viscount Sankey said, at 381:

In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides.* The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the Interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust.* The earlier cases are concerned with trusts of specific property: *Keech v. Sandford* [1726], Sel. Cas. Ch. 61, per Lord King, LC The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.

Per Lord Russell of Killowen at 386:

The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides;* or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

The implications of equity's rule are far-reaching as the case of *Boardman v. Phipps* [1967] 2 AC 46 has shown. See *G.H. Jones* [1968] 84 LQR 472, at p. 474 where the learned writer says this:

The implications of equity's rule are far-reaching. Once a fiduciary is shown to be in breach of his duty of loyalty he must disgorge any benefit gained even though he acted honestly and in his principal's best interests, even though his principal benefited as well as he from his conduct, even though his principal could not otherwise have obtained the benefit, and even though the benefit was obtained through the use of the fiduciary's own assets and in consequence of his personal skill and judgment.

Before embarking on my inquiry as directed by the Supreme Court under order (3), it is necessary to consider the nature of the relationship between the plaintiff and the defendant and to the question whether that relationship imposed on the defendant, in relation to the particular transaction under investigation, duties of a fiduciary character. This is necessary because, as has already been seen, it is not every kind of fiduciary relationship that justifies every kind of interference or, as was put by Fletcher Moulton LJ, "The nature of the fiduciary relation must be such that it justifies the interference."

Paragraph 13(a) of the statement of claim reads:

13. (a) By reason of the joint-venture agreement and by reason of all the circumstances of the case, the defendant is and was at all material times under a fiduciary or legal duty to act honestly and fairly **in all its dealings** with the plaintiff **pertaining to the said land.** [the emphasis is mine]

(b) The defendant has at all material times acted in breach of its aforesaid duty.

In the case of a partnership, a partner is a fiduciary towards his co-partners in all partnership dealings and transactions. By paragraph 13 of the statement of claim the plaintiff is alleging a fiduciary relationship that is akin to that of a partnership.

In *Lindley & Banks on Partnership*, 16th Edn. (1990) it says, at pp. 412, 413, para. 16-08:

> it was established by numerous decisions prior to the Partnership Act 1890, that one partner was not at liberty to make a profit at the expense, of his co-partners without their full knowledge and consent, whether that profit was made directly or indirectly, e.g. by appropriating some benefit to himself which he ought to have acquired, if at all, on behalf of all the partners. The obligation established by those decisions was placed on a statutory footing in the Partnership Act 1890:
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> > 29. (l) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connection.
> >
> > (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
> >
> > 30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.
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> Although all questions of accountability must now be determined by reference to the above sections, the pre-1890 cases still afford a valuable illustration of the principles on which the sections were based and will frequently indicate the way in which they are likely to be applied by the Courts.

See also ss. 31 and 32 in our Partnership Act 1961 which are similar to the English provisions. The two sections are as follows:

> 31.(1) Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection.
>
> (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
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> 32. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

In the present case, the agreement has been described by the parties as a joint venture agreement. The question is, is the defendant a fiduciary as a partner in a partnership is a fiduciary towards his co-partners in all partnership dealings and transactions? The answer will depend on whether the agreement, by whatever name it is called, has all the normal attributes of a partnership.

Before I start to scrutinise the parties' arrangements in the contract, I must first say a few words on what are the normal attributes of a partnership. *Lindley & Banks on Partnership*, 16th edn., (1990) says, at p. 59, para. 5-01:

The ultimate test of the existence of a partnership is by reference to the statutory definition set out in s. 1 of the Partnership Act 1890, as illuminated by the rules set out in s. 2. Although the earlier cases, on which those sections were based, may be of relevance, they cannot take precedence over the provisions of the Act itself.

In this country, the statutory definition is set out in s. 3 of the Malaysian Partnership Act 1961, as illuminated by the rules set out in s. 4 which are in *pari materia* to the U.K. provisions.

Section 3(1) of our Partnership Act 1961 reads:

3.(1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

And s. 4 provides as follows:

4. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(a) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

(b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;

(c) the receipt by a person of a share of the profits of business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular:

(i) the receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(iii) a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business or liable as such;

(iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits, arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such:

Provided that the contract is in writing and signed by or on behalf of all the parties thereto; and

(v) a person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not, by reason only of such receipt, a partner in the business or liable as such.

In *Chooi Siew Cheong v. Lucky Height Development*, Chong Siew Fai FCJ said this, at 521:

> The term "partnership" is defined as the relation which subsists between persons carrying on a business in common with a view of profit (s. 3(1) of the Act). In deciding whether or not a partnership exists, the Court, apart from giving regard to the relevant rules in s. 4 of the Act, must consider the intentions of the parties as appearing from the whole facts of the case and the contract they had made.
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> The opening sentence of rule (c) of s. 4 of the Act provides: "the receipt by a person of a share of the profits of business is *prima facie* evidence that he is a partner in the business". The term "*prima facie* evidence" means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention, i.e. that the person is a partner in the business. (See 17 *Halsbury's Laws of England* (4th Edn) at para 28.)

Lindley & Banks on Partnership, 16th edn. (1990), at pp. 60, 61 para. 5-03, puts it thus:

> if, on a consideration of all the surrounding circumstances, a contract exhibits all the normal attributes of a partnership save that the parties are called something other than partners, e.g. joint venturers, they will almost inevitably be held to be in partnership.

And para. 5-04, at p. 61 says:

> Conversely, it cannot automatically be assumed that the participants in a joint venture do not each intend to carry on their own separate businesses. Such a situation is by no means unknown, e.g. share farming and oil exploration ventures. In such cases, it is necessary to scrutinise the parties' arrangements in order to ascertain their true intentions.

I shall now scrutinise the parties' arrangements in the agreement. It is described on the cover of the agreement as "**Joint Venture Agreement**". But nowhere in the text of the agreement is the term "Joint venture" mentioned. The agreement was dated 2 October 1980 between Sri Alam Sdn. Bhd. (the plaintiff) which is referred to as "the company" of the one part and Newacres Sdn. Bhd. (the defendant) which is referred to as "the developer" of the other part.

The company (the plaintiff) was at the relevant time the registered proprietor of the land mentioned in the agreement (first recital). The third and last recital says this:

> **And Whereas** the company has offered to the developer and the developer has accepted the offer to develop the said land into the said housing development as aforesaid upon the terms and conditions hereinafter contained.

The thrust of the contract is set out in clause 1 of the agreement which is as follows:

> 1. In consideration of the developer paying to the company upon execution of this agreement a sum of Dollars Five Hundred Thousand (RM500,000) only (the receipt whereof the company hereby acknowledges) being deposit and part of the advance referred to in clause 2 hereof and subject to the respective agreements undertakings and obligations of the parties as herein set out the company hereby allows the developer to develop the whole of the said land and to design construct and complete for the company the said buildings including access roads drainage and other housing amenities in accordance with the said building plans, specifications and layout-plan or as amended but subject to the approvals of or amendments made thereon by the appropriate authorities and subject further to the terms and conditions hereinafter contained. Upon The Condition that the developer shall retain free from all encumbrances in accordance with and subject to the provisions of the clauses 5 and 22 hereof the balance of the plots to be sub-divided from the said land remaining after the allocation to the company the number of the said lots in accordance with clauses 5 and 22 hereof.

Put shortly, clause 1 means this:

(1) The defendant is to pay to the plaintiff an advance of RM7,500,000 to the plaintiff in accordance with clauses 1 and 2.

(2) The defendant is "to develop the whole of the said land and to design construct and complete for the company the said buildings including access roads drainage and other housing amenities in accordance with the said building plans, specifications and layout plan or as amended but subject to the approvals of or amendments made thereon by the appropriate authorities" on the terms and conditions thereinafter contained in the agreement.

(3) The plaintiff will be alloted the number of plots set out in clauses 5 and 22.

(4) The defendant will retain "the balance of the plots" to be sub-divided from the land.

The above clearly shows that this is a straight forward commercial transaction between a housing or property developer and the proprietor of land. For developing the land (which is described in the recital as "the land held under C.T. No. 19542 for Lot 82 Mukim and Daerah of Klang comprising in area approximately 584 acres 3 roods 0 poles"), that is, by putting up the buildings (together with their attendant infrastructure and amenities) for the plaintiff/proprietor, the defendant/developer is to have the balance of the remaining plots after alloting to the plaintiff the number of plots of the various types set out in clause 5 of the agreement plus any entitlement to receive further plots if the conditions stated in clause 22 are satisfied.

The situation in the present case is almost on all fours with the situation in the Federal Court case of *Chooi Siew Cheong v. Lucky Height Development*. See the judgment of Chong Siew Fai FCJ, at 521, 522 where he said:

> In the instant case under appeal, the plaintiff (through his father who was a party to the initial agreement) provided the land and the first defendant company was to provide capital, labour and services to develop and build on the land. With their combined resources they were to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sub-lots with or without buildings erected thereon respecting which there was to be complete freedom to deal with or dispose of as he or it wished. In other words, each intended a wholly separate business; there was no "business in common", ie a single business by the parties nor, it follows, "with a view of profit" from such business. In our view, therefore, no partnership resulted from the agreement.
>
> At the hearing of the appeal, *Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd.* [1991] 3 MLJ 474 was cited. That case, however, is no authority for the proposition that joint ventures in all joint venture agreements are partners within the (Partnership) Act. It dealt with the question of fiduciary relation.

And a little later (at 522) the Judge went on to say:

> While joint ventures in an undertaking may owe certain fiduciary duties to one another, the existence of such duties does not necessarily make them partners under the Act.

After scrutinising the agreement, I find that the contract, even though it is described as a joint venture agreement by the parties, does not exhibit the normal attributes of a partnership. Many of the rights and duties normally associated with partnership, such as, an obligation to contribute capital and to share losses and profits and a right to participate fully in the management of the firm (unless one is a sleeping partner) are not exhibited in the so called joint venturers' arrangement in the contract. Section 3 (1) of the Partnership Act says that "Partnership is the relation which subsists between persons

carrying on business in common with a view of profit." In the instant case, there is no "business in common" between the plaintiff and the defendant. In fact, each is carrying on a wholly separate business, so that there is no "business in common," let alone one "with a view of profit." The plaintiff provides the land and the defendant the financial means to develop and build on the land. To borrow the words of Chong Slew Fai FCJ (*Chooi Siew Cheong v. Lucky Height Development* at 521), "With their combined resources they were to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sublots with or without buildings erected thereon respecting which there was to be complete freedom to deal with or dispose of as he or it wished. In other words, each intended a wholly separate business; there was no 'business in common,' i.e. a single business by the parties nor, it follows, 'with a view of profit' from such business." In my judgment, there is no partnership and the defendant is not a fiduciary as a partner in a partnership is a fiduciary towards his co-partners.

The next clause which has to be scrutinised is clause 15. The clause reads:

> 15. At any time after the execution of this agreement and simultaneously with the payment pursuant to clause 2(a) hereof and the execution of the guarantee under clause 9 hereof, the developer may by notice in writing to the company require the company to transfer the said land to the developer subject always to the company's entitlement under clause 5(a) hereof and the properties described thereof being held by the developer on trust for the company. Immediately upon such transfer being effected, the said land shall be deemed to have been sold to the developer subject nevertheless to the terms hereof and the developer shall be entitled to deal with the said land as beneficial owners thereof. Both parties shall comply with the provisions of the Real Property Gains Tax Act, 1976 (if applicable) and in particular shall submit all requisite returns to the Director General of Inland Revenue Malaysia and it is hereinbefore expressly agreed that the company shall be liable for and indemnify the developer against liabilities, the Real Property Gains Tax (if any) chargeable against the company arising out of the sale of the said land.

The clause means this. When the land was subsequently transferred to the defendant under clause 15, it was "deemed to have been sold to the developer" (the defendant) under the terms of the agreement. The sale was subject to the plaintiff's entitlement under clause 5(a) and the properties described therein are to be held on trust by the defendant for the plaintiff. Therefore as trustee the defendant is in a fiduciary position to the plaintiff in respect of the plaintiff's entitlement under clause 5(a).

As a fiduciary, the trustee (the defendant) is not allowed to make a profit from the trust. This passage in *Snell's Equity* (29th edn. (1990), at p. 245) has conveniently summarised what I have said earlier in this judgment on the obligation or duty of a trustee fiduciary not to profit from his position:

> With certain exceptions, neither directly nor indirectly may a trustee make a profit from his trust. ... he may not put himself in a position where his duty and his interest may conflict, or where he may be able to take advantage of knowledge of the property (e.g. as to valuable minerals under the land) which he acquired while trustee.
>
> The rule depends not on fraud or *mala fides*, but on the mere fact of a profit made. It applies to all types of trustee, including custodian trustees, and to other persons in fiduciary positions.

After having said that the defendant is (in relation to clause 5(a)) a trustee and as such trustee is a fiduciary to the plaintiff, I now come to consider clause 5(a) which reads as follows:

5. (a) The company shall be allocated the following plots completely developed together with all the necessary infrastructure and amenities by the developer constructing at its sole cost and expenses the relev[a]nt residential, commercial or other buildings on such said plots:

Types of Plots	No. of Plots
1. Low Costs Houses	1,105
2. Single Storey Terrace Houses	399
3. Low Costs Flats	264
4. Petrol Kiosks	2
5. Shop Houses	79
6. Double-Storey Terrace Houses	198
7. Semi-detached Houses	56

It is common ground that the plaintiff's entitlement to the allocations of the units for items 1 to 6 have been delivered and there is no dispute about them in the present action.

As for item 7, i.e. 56 units of semi-detached houses, the defendant had omitted them in the 1983 amended layout plan. But Encik Mohamed Ismail (for the defendant) says that the layout plan has been amended since to provide for 60 units of semi-detached houses and that they are undergoing construction at the present time and that the 56 units would be delivered to the plaintiff when completed.

The result of this is that only item 7 of the plaintiff's entitlement in clause 5(a) has not been delivered. In the event of late or non delivery of the outstanding 56 units of semi-detached houses, the plaintiff's remedy lies in contract (probably on a claim for damages for breach of contract for late or non delivery, or for specific performance). Although the plaintiff is contractually entitled to the 56 units of semi-detached houses, there is no pleading for such a cause of action. Also the cause of action had not accrued at the time when the proceeding was filed in 1985. At that time, delivery was not due yet. The period for performance by the defendant under the contract which was dated in 1980 was 8 years (which could be extended under clause 21 and which in fact was extended to 1990). But had the defendant made use of its position as trustee to make a profit out of the trust property, equity would require the defendant as a fiduciary to disgorge its profits or other advantage to the plaintiff. The question is, was there in fact a profit made by the defendant from its trust out of the remaining units which have not been delivered yet? I find that there is not a shred of evidence to show that such was the case. I am satisfied, therefore, that the defendant did not breach its duty as a fiduciary.

In the case of clause 5(a), the defendant is a trustee and as such trustee is a fiduciary to the plaintiff, and the duty of a fiduciary who is holding property in trust not to profit from his trust applies to the defendant as such trustee. This duty also applies to other persons in fiduciary positions even though they are not trustees. For a summary on the duty of other persons in fiduciary positions (as has already been addressed in this judgment), see *Snell's Equity, ante*, at p. 251, where it says:

> Principles similar to these are applicable to all other persons who, even though they are not trustees holding property in trust, nevertheless occupy a fiduciary position. All these persons must refund with interest all profits which they have made by means of their position or by means of property held by them, unless they made the profits with the full knowledge and approval of the persons to whom they owe a duty.

So that for the other remaining provisions of clause 5, there are those in which the defendant occupies a fiduciary position even though the defendant is not a trustee holding property in trust.

I shall now consider those remaining provisions in clause 5 where the defendant occupies a fiduciary position. I shall start with clause 5(b) which reads:

> 5(b) The company shall be allocated all the bungalow plots as approved in the layout-plan as presently approved with all necessary infrastructure and amenities to be constructed at the sole cost and expense of the developer but without any buildings.

Mr. Manoharan (for the plaintiff) says that there were 149 bungalow plots in the original layout plan but the defendant had only alloted to the plaintiff 142 bungalow plots. The defendant says that the shortage of 7 bungalow plots was caused by planning requirements and Lembaga Letrik Negara adjustments so that it was not possible to fit 149 bungalow plots in the given area as shown in the original plan. If the defendant was in breach of clause 5(b) by not providing the full entitlement of 149 bungalow plots to the plaintiff, but instead only provided for 142 plots, the remedy (to recover the outstanding entitlement of 7 bungalow plots) for the plaintiff lies in contract. But there is no pleading for a cause of action founded on contract to claim the plaintiff's entitlement for the outstanding 7 bungalow plots. In any case this cause of action had not accrued when the proceeding was commenced in 1985. But had the defendant (which occupied a fiduciary position) made profits by means of its position or by means of the property held by it, then equity would require the defendant as a fiduciary to disgorge with interest all profits which it had made. There is not a jot of evidence which points to the fact that profit was made by the defendant by means of its position or by means of this property. Therefore, I find that there was no breach of the defendant's fiduciary duty with regard to clause 5(b).

The next clause which I need to consider is clause 5(d) which reads:

> 5(d) The company shall also be entitled and be allocated the following:
>
> (i) thirty-five percent (35%) of the cinema unit to be built by the developer at its own costs and expenses;
>
> (ii) thirty-five percent (35%) of any extra shop-lots and thirty-three percent (33%) of any extra residential plots fully developed by the Developer at its own cost and expense together with all necessary infrastructure and amenities, such extra plots being available on the basis of the layout plan as presently approved after survey.
>
> (iii) all portions of the said land required for public use or purpose.

On clause 5(d)(i), to date the cinema has not been built yet so that any claim by the plaintiff to his entitlement under this sub-clause, for example, for specific performance of this term, lies in contract.

But there is no pleading for such a cause of action. In any case the cause of action had not accrued when the action was filed in 1985.

As for clause 5(d)(ii), the question as to how this term is to be interpreted is contractual in nature. Clause 5(a) states the actual number of units to be alloted to the plaintiff by the defendant. On the other hand, clause 5(d)(ii) speaks of the percentage of the plots to be alloted to the plaintiff. What clause 5(d)(ii) means is this. If after a survey was done based on the original layout plan and applying the percentages as stated in the sub-clause (35% for shop lots and 33% for residential plots) it was found that the number of units for each category exceeds the number of those which is stated in clause 5(a) as the

plaintiff's entitlement, then such extra units shall be allocated to the plaintiff. But a survey based on the original layout plan was never done. It appears that a survey is now no longer possible as subsequent events have overtaken the position as envisaged by this subclause. Without a survey being done, we would not know if there would be any extra units to which the plaintiff would be entitled under the sub-clause (5(d)(ii)). Who should have done the survey? Clause 5(d)(ii) is silent as to that, which means that either the plaintiff or the defendant could have done the survey. Encik Mohamed Ismail says that since there was no survey done (and the plaintiff's entitlement to extra units, if any, under clause 5(d)(ii) could only be ascertained after survey), therefore, only clause 5(a) remains and it prevails. As I have said earlier, the question is one of construction of these two terms in the contract. If, as a matter of construction, the plaintiff was entitled to have the survey done by the defendant under clause 5(d)(ii), then the plaintiff should have sued the defendant to compel it to have the survey done. But that should have been done before events have overtaken it. In my view, since the survey was not done and it is now too late to have it done, clause 5(d)(ii) has become superfluous and can no longer be applicable. Therefore, only the plaintiff's entitlement under clause 5(a) remains and it prevails.

Clause 5(d)(iii) says that the plaintiff is entitled to all portions of the land required for public use or purpose. If the plaintiff was entitled to them under the terms of the contract, then it should have sued for them. But there is no pleading for such a contractual claim in the statement of claim. Encik Mohamed Ismail says that this term is repugnant and should be disregarded as superfluous as land required for public use or purpose has to be surrendered to the state authority. But Mr. Manoharan says that what he is asking for are those portions of the land which have been saved from being taken over by the state authority as public utility land. Whichever view is correct is a matter of construction of this particular term in the contract. But there is no pleading for a claim under clause 5(d)(iii) by the plaintiff.

I now come to clause 22, the relevant parts of which read:

> 22. It is hereby agreed between the parties hereto that the developer shall be entitled at its sole costs and expenses to amend the approved layout plan to increase the number of housing plots to be subdivided from the said land **Provided Always That:**
>
> (a) such said amendments shall not affect the area of each of the plots to be allocated to the company under clause 3 *[this is a typographical error, it should read as 5]* hereof and as far as possible not to [a]ffect the relative positions of the same;
>
> (b) the company shall be allocated twelve percent (12%) of each type of the building (including corner plots) to be erected by the developer on such increased plots;

This clause allows the developer (the defendant) to amend the approved layout plan so as to increase the number of housing plots on the land, in which event, the plaintiff is entitled to 12% of the buildings (including corner plots) to be built on the increased plots. The development on the land is still going on. Any claim by the plaintiff for its 12% entitlement under this clause is contractual in nature. There is no pleading for it in the present case.

In my judgment, I am of the view that in respect of the terms in clauses 5 and 22, the claims that could have been made against the defendant are contractual in nature. Since there are no pleadings for those claims, I need not have to express any opinion on them. In any case, they are outside the scope of my inquiry as ordered by the Supreme Court by order (3). Therefore, confining myself to order (3), I am satisfied that there is no

evidence whatsoever that the defendant had made a profit by means of its position or by means of property held by it for the plaintiff. I find that the defendant had not breached its fiduciary duty. As fiduciary, the defendant has to disgorge all profits which it had made by means of its position or by means of property held by it. There is not a tittle of evidence that profits have been made by the defendant by such means.

The duty of a fiduciary not to profit from his position as a fiduciary is an inflexible rule of equity and it depends not on fraud or absence of *bona fides,* but on the mere fact of a profit made.

Once a fiduciary is shown to be in breach of his duty of loyalty (that is to say, his obligation not to profit from his position as a fiduciary) he must disgorge any benefit gained even though he acted honestly and in his principal's best interests.

The extent of a fiduciary's duty will depend on the nature of the relationship. In the case of a partnership, the fiduciary duty of a partner towards his co-partners extends to all partnership dealings and transactions.

In the instant case, the extent of the defendant's fiduciary duty towards the plaintiff extends only the position of the defendant as a fiduciary in relation to clauses 5 and 22 of the contract.

And finally I come to order (4) where this Court (High Court) has been asked to make a determination on the issue of set off.

Clause 4 of the contract reads:

> The company hereby expressly agrees that the advance shall be repaid by allowing to the developer to retain out of or set off against the purchase prices of the buildings to be built on the sub-divided plots and allocated to the company in accordance with clauses 5 and 22 hereof such purchase price to be paid by the respective purchasers to the developer for account of the company.

The clause allows the developer (the defendant) to set off the advance of $7.5 million (which the defendant had made to the plaintiff under clauses (1) and (2) of the contract) against the purchase price collected from the plaintiff's purchasers by the defendant on behalf of the plaintiff.

Encik Mohamed Ismail says that, in addition to the retention of the advance of $7.5 million, the defendant is also entitled to retain out of the money collected from the plaintiff's purchasers money due to the defendant by the plaintiff under clauses 6(a) and 12(i).

Order 18 r. 17 reads:

> 17. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as counterclaim.

The defence of set off is available in answer to the whole or part of a claim made by the plaintiff. As the plaintiff had not made a claim for the money collected on its behalf by the defendant from the plaintiff's purchasers in his statement of claim, this defence is therefore not available to the defendant in the present case.

For the reasons which I have stated above, I dismiss the plaintiff's claim with costs to the defendant.